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GENEVA PASS TO FRANKLIN WILLIS

E.O. 11652: N/A

TAGS: EFIN, OECD

SUBJECT: INVISIBLE COMMITTEE DISCUSSION OF UN LINER
CODE, NOVEMBER 6-8

REF: OECD DOC. DAF/INF/74.46 (1ST REVISION)

1. SUMMARY. INVISIBLES COMMITTEE (IC) SPENT THREE FULL DAYS ON QUESTION OF COMPATIBILITY BETWEEN INVISIBLES CODE AND UN CONVENTION ON LINER CONFERENCES, BUT FAILED TO CONCLUDE ITS DELIBERATIONS. SHARP DIVISIONS STILL REMAIN BETWEEN MAJORITY AND MINORITY VIEWS, ALTHOUGH SOME PROGRESS HAS BEEN MADE IN IDENTIFYING AMBIGUOUS AREAS OF UN CONVENTION. SECRETARIAT CONTINUES TO STRIVE FOR COMPROMISE FORMULA WHICH WOULD ALLOW IC TO MAKE AGREED RECOMMENDA-

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TION TO COUNCIL (SEE REVISED CHAPTER IV SEPTTEL). IC HAS

CREATED DRAFTING PARTY OF US, UK, JAPANESE AND FRENCH EXPERTS TO MEET FRIDAY, NOVEMBER 15. FULL COMMITTEE WILL MEET AGAIN ON NOVEMBER 22 (AND IF NECESSARY, NOV. 23) TO COMPLETE FINAL DRAFT OF REPORT FOR TRANSMISSION TO COUNCIL. ACTION REQUESTED: PLEASE TRANSMIT DEPARTMENT'S VIEWS BY OPENING OF BUSINESS, FRIDAY, NOV. 15 ON QUESTIONS RAISED IN PARAGRAPHS BELOW. END SUMMARY

2. PRIOR TO MEETING, US EXPERT PREPARED EXTENSIVE AMENDMENTS TO REF DOC WHICH WERE TABLED BY US, UK, SWISS, NORWEGIAN OR FINNISH EXPERTS DURING MEETING. MAIN CONCERN OF THESE COUNTRIES WAS WHETHER THEY COULD MAINTAIN SLIM MAJORITY FROM SEPTEMBER MEETING IN VIEW OF STRONG PRO-CONVENTION POSITION OF GERMAN REPRESENTATIVES AT RECENT MARITIME TRANSPORT COMMITTEE (MTC) MEETING, AND INDICATIONS FROM ITALIAN EXPERT THAT HIS GOVERNMENT INTENDS ULTIMATELY TO SIGN CONVENTION. FORTUNATELY GERMAN EXPERT CONTINUED TO ACT INDEPENDENTLY AND SUBSCRIBED ONCE AGAIN TO MAJORITY VIEWS. ITALIAN WAS SILENT OR AMBIGUOUS THROUGHOUT MEETING. PRESENT MAJORITY IS THEREFORE 7 TO 5 OR 8 TO 4 DEPENDING ON CONTINUED GERMAN SUPPORT AND ITALIAN EXPERTS' WILLINGNESS TO FOLLOW INDEPENDENT LINE. WITHOUT THEM, IC WOULD SPLIT DOWN MIDDLE AND BE UNABLE TO MAKE SUBSTANTIVE RECOMMENDATION TO COUNCIL. US AND UK EXPERTS ARE THEREFORE TRYING TO DRAFT MAJORITY OPINIONS IN MANNER ACCEPTABLE TO ALL MEMBERS OF MAJORITY, SO THAT SEVERAL DISSENTING OPINIONS WILL NOT BE PUT FORWARD TO COUNCIL. ALL MEMBERS OF IC ARE PRESENTLY AGREED THAT IT WOULD BE UNDESIRABLE TO PRESENT A MULTITUDE OF DIVERSE VIEWS TO COUNCIL, IF THIS CAN POSSIBLY BE AVOIDED WITHOUT SACRIFICING INTEGRITY OF VIEWS.

3. CHANGES IN CHAPTER I: ONLY SUBSTANTIVE CHANGE IN CHAPTER I WAS REVISION OF PARA 20 AT US REQUEST TO HIGHLIGHT WAYS IN WHICH CONFERENCE LOYALTY AGREEMENTS DISCOURAGE USE OF NON-CONFERENCE SERVICES. THIS REVISION INTENDED TO UNDERCUT AUSTRALIAN AND JAPANESE VIEW THAT SHIPPERS' FREEDOM OF CHOICE WILL NOT BE RESTRICTED BY APPLICATION OF UN CONVENTION TO CONFERENCES, SINCE THEY LIMITED OFFICIAL USE

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CAN ALWAYS USE NON-CONFERENCE LINES.

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4. CHANGES IN CHAPTER II: SIGNIFICANT CHANGES WERE MADE IN PARAS 31-32 AND PARAS 37-44, ALL OF WHICH WERE ACCEPTABLE TO US EXPERT.

A. PARAS 31-32 REVISED AT US AND NORWEGIAN REQUEST TO REINSTATE DESCRIPTION OF ITEM C/1 AND NOTE 1 IN FIRST DRAFT PARAS 28-29.

B. PARAS 37-44 REVISED SUBSTANTIALLY AT SECRETARIAT SUGGESTION TO REFLECT WITHDRAWAL OF MINORITY VIEW THAT NOTE 1 CREATES POSITIVE OBLIGATIONS FOR OECD MEMBERS TO TAKE STEPS AGAINST RESTRICTIVE SHIPPING PRACTICES, EVEN IF SUCH STEPS ARE SPECIFICALLY PROHIBITED BY NOTE 1. THESE PARAS NOW READ AS FOLLOWS:

"PARA 37. LINER CONFERENCES ARE NOT EXPRESSLY REFERRED TO IN THE O.E.C.D. CODE OF LIBERALISATION OF CURRENT INVISIBLE OPERATIONS OR IN NOTE 1, ALTHOUGH THEY WERE WELL ESTABLISHED LONG BEFORE THEIR ADOPTION. THE QUESTION RE-

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MAINS WHETHER NOTE 1 NEVERTHELESS CREATES OBLIGATIONS FOR GOVERNMENTS IN RELATION TO CONFERENCES.

"PARA 38. THE COMMITTEE FOR INVISIBLE TRANSACTIONS IS OF THE OPINION THAT THE ITEM C/1 AND NOTE 1 ARE NOT INTENDED TO REGULATE THE LINER CONFERENCE SYSTEM OR TO INTERFERE WITH AGREEMENTS CONCLUDED BETWEEN CONFERENCE MEMBERS.

PARA 39 THE O.E.C.D. CODE IS ADDRESSED TO MEMBER COUNTRY GOVERNMENTS. IT REGULATES GOVERNMENTAL ACTION AND CALLS FOR THE REMOVAL OF OFFICIALLY IMPOSED RESTRICTIONS SUCH AS THE PROHIBITED MEASURES LISTED IN THE SECOND SENTENCE OF NOTE 1 WHICH CAN BE TAKEN ONLY BY GOVERNMENTS OR PURSUANT TO GOVERNMENTAL AUTHORITY.

PARA 40 LINER CONFERENCES ARE BASED ON PRIVATE ARRANGEMENTS, AND THE COMMITTEE CONSIDERS THAT IN THE ABSENCE OF ANY EXPRESS REFERENCE THERETO, NOTE 1 DOES NOT REQUIRE GOVERNMENTS TO INTERFERE WITH THE RESTRICTIVE PRACTICES OF CONFERENCES. NOR, HOWEVER, DOES IT PREVENT THEM FROM DOING SO, PROVIDED THEY USE MEANS COMPATIBLE WITH THE OBLIGATIONS OF THE CODE.

PARA 41 THE O.E.C.D. CODE REQUIRES GOVERNMENTS TO REFRAIN FROM TAKING ACTION WHICH WOULD BE CONTRARY TO 'THE PRINCIPLE OF FREE CIRCULATION OF SHIPPING IN INTERNATIONAL TRADE IN FREE AND FAIR COMPETITION'. GOVERNMENTS MIGHT HOWEVER NOT REMAIN INDIFFERENT TO LIMITATIONS ON FREE AND FAIR COMPETITION RESULTING FROM THE ACTIVITIES OF CERTAIN CONFERENCES AND BE LED TO TAKE MEASURES TO STIMULATE COMPETITION WITHIN CONFERENCES BY VIRTUE OF THE PRINCIPLES SET OUT IN NOTE 1. BUT IF IT WERE FOUND THAT CERTAIN GOVERNMENTS WERE, THROUGH 'INTERNAL ARRANGEMENTS' CONCERNING CONFERENCES, IMPEDING MEASURES OF LIBERALISATION, ARTICLE 16 OF THE CODE WOULD APPLY AND WOULD GIVE THE MEMBER COUNTRY AFFECTED A RIGHT OF REFERENCE TO THE ORGANIZATION."

5. CHANGES IN CHAPTER III: SECRETARIAT HAS COMPLETELY REDRAFTED PARAS 51-56 IN ATTEMPT TO REFLECT BROAD DIFFERENCES OF VIEW REGARDING MANDATORY NATURE OF CONVENTION AND PRACTICAL POSSIBILITIES OF ENFORCEMENT. MAJORITY LIMITED OFFICIAL USE

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VIEW DRAFTED BY US READS AS FOLLOWS:

A. "MOST MEMBERS OF THE INVISIBLES COMMITTEE ARE OF THE OPINION THAT THE UN CONVENTION WAS INTENDED TO BE A MANDATORY INSTRUMENT AND THAT ITS PROVISIONS ARE LEGALLY BINDING ON CONTRACTING PARTIES AND ENFORCEABLE BY THEM. THEY NOTE THE CLEAR INTENTION OF THE UNITED NATIONS TO

ADOPT A LEGALLY BINDING INSTRUMENT, AND RECALL THAT EFFORTS IN THE PREPARATORY COMMITTEE TO MAKE IT RECOMMENDATORY WERE REJECTED IN FAVOR OF A MANDATORY APPROACH. CONSISTENT WITH THIS DECISION, ARTICLE 47 (L) CREATES AN OBLIGATION FOR CONTRACTING PARTIES TO TAKE THE NECESSARY LEGISLATIVE OR OTHER MEASURES TO IMPLEMENT THE CONVENTION. THE RULES ON MEMBERSHIP IN ARTICLE 1 AND ON CARGO-SHARING IN ARTICLE 2 WOULD THUS BECOME PART OF THE NATIONAL LEGISLATION OR ADMINISTRATIVE PROCEDURE OF THE CONTRACTING PARTY.

B. "WITH REGARD TO ENFORCEMENT, THE CONVENTION PROVIDES FOR MANDATORY INTERNATIONAL CONCILIATION, WHEREBY CONCILIATORS NOMINATED BY CONTRACTING PARTIES MUST MAKE RECOMMENDATIONS IN ACCORDANCE WITH THE PROVISIONS OF THE CONVENTION. (ARTICLES 30 (1), 35 (1)). SUCH CONCILIATION PROCEEDINGS MUST TAKE PRECEDENCE OVER REMEDIES AVAILABLE UNDER NATIONAL LAW. (ARTICLE 25 (3)). RECOMMENDATIONS OF THE CONCILIATORS WHICH ARE ACCEPTED BY

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PARTIES TO THE CONCILIATION PROCEDURE MUST BE RECOGNIZED BY CONTRACTING PARTIES AS BINDING AND MUST BE ENFORCED AS IF THEY WERE A FINAL JUDGMENT OF A COURT OF THAT CONTRACTING PARTY. (ARTICLE 39 (L)). WHERE SOME PARTIES ACCEPT AND OTHERS REJECT A RECOMMENDATION, THE CONTRACTING PARTY WOULD HAVE TO ENFORCE THE RECOMMENDATION WITH REGARD TO THE PARTIES WHICH HAVE ACCEPTED IT, THEREBY APPLYING THE PROVISIONS OF THE CONVENTION TO THE DETRIMENT OF THE PARTY WHICH DOES NOT ACCEPT IT. A PARTY WHICH REJECTS A RECOMMENDATION WOULD PRESUMABLY HAVE RECOURSE TO NATIONAL COURTS AFTER THE FAILURE OF INTERNATIONAL CONCILIATION, IN WHICH CASE THE COURTS WOULD NOT BE ABLE TO RULE CONTRARY TO NATIONAL MEASURES TAKEN TO IMPLEMENT THE CONVENTION.

C. "ACCORDING TO THE ABOVE INTERPRETATION, CONTRACT-
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ING PARTIES WOULD BE OBLIGED TO TAKE MEASURES TO ENSURE THE OBSERVATION OF THE PROVISIONS AND PRINCIPLES OF THE CONVENTION AND IN SOME CASES WOULD BE REQUIRED TO ENFORCE THESE PRINCIPLES IN A WAY WHICH WOULD IMPOSE OFFICIAL RESTRICTIONS ON LINER CONFERENCES, OR OFFICIALLY SANCTION RESTRICTIVE PRACTICES ADOPTED BY THEM."

6. MINORITY VIEW PLACES EMPHASIS ON APPLICABILITY OF PRIVATE LAW OF CONTRACTS IN CASES WHERE CONFERENCE MEMBERS AGREE ON RESTRICTIVE PRACTICES, AND ON IMPOSSIBILITY OF ENFORCEMENT WHEN THEY DISAGREE. THE MINORITY VIEW IN THE SECRETARIAT REDRAFT IS AS FOLLOWS:

A. "OTHER MEMBERS SEE THE PROBLEM DIFFERENTLY. SINCE THE CONVENTION EXCLUSIVELY APPLIES TO THE INTERNAL FUNCTIONING OF THE CONFERENCES, ONE OF TWO SITUATIONS ARISES.

B. "EITHER CONFERENCE MEMBERS (I.E. SHIPPING LINES) ARE IN AGREEMENT WITH RESPECT TO ALL ASPECTS' NOTABLY THE COMPOSITION OF THE CONFERENCE ITSELF (ARTICLE 1) AND THE SHARES OF TRAFFIC (ARTICLE 2), FREIGHT RATES, ETC.. IN THAT CASE THE CONFERENCE RULES REMAIN, AS AT PRESENT A MATTER OF PRIVATE LAW, LEGALLY ENFORCEABLE IN THE COURTS, AND THE ONLY NEW COMMITMENT UNDERTAKEN BY THE CONTRACTING PARTIES IS TO ENSURE THAT SUCH COURT DECISIONS CONCERNING THE APPLICATION OF CONFERENCE RULES BE CONSIDERED AS BINDING IN THEIR OWN JURISDICTION. THIS VIEW IS BASED ON ARTICLE 39 (1), WHICH READS

'EACH CONTRACTING PARTY SHALL RECOGNIZE A RECOMMENDATION AS BINDING BETWEEN THE PARTIES WHICH HAVE ACCEPTED IT, AND SHALL ENFORCE...ALL OBLIGATIONS IMPOSED BY THE RECOMMENDATION AS IF IT WERE A FINAL JUDGMENT OF A COURT OF THAT CONTRACTING PARTY.'

C. "OR CONFERENCE MEMBERS OR OTHER INTERESTED PARTIES (SHIPPERS FOR INSTANCE) DISAGREE ABOUT THE RULES OF THE CONFERENCE, AND A DISPUTE ARISES. IN THAT CASE THE CONCILIATION PROCEDURES OF CHAPTER VI ARE OPERATIVE. BUT THE RECOMMENDATIONS ARE BINDING ONLY FOR THE PARTIES WHICH FORMALLY ACCEPT THEM' AS IS CLEAR FROM ARTICLES 37 (1), 38 (1) AND 39 (1), AND CONTRACTING PARTIES ASSUME NO OBLIGATION TO ENFORCE RECOMMENDATIONS AGAINST PARTIES LIMITED OFFICIAL USE

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TO THE DISPUTE WHICH DO NOT ACCEPT THEM. INTERESTED GOVERNMENTS MAY ACT ONLY AS OBSERVERS, AND HAVE NO DECISION-MAKING POWER IN THE CONCILIATION PROCEDURE. VIS-A-VIS PARTIES IN AGREEMENT AND PARTIES WHICH ACCEPT RECOMMENDATIONS FOLLOWING THE CONCILIATION PROCEDURE, CONTRACTING PARTIES HAVE THE SAME OBLIGATIONS AS IN THE PRECEDING CASE."

7. COMMENT: MAJORITY VIEW IN PARA 5 B ABOVE DIFFERS IN TWO IMPORTANT RESPECTS FROM MINORITY. FIRST, IT ASSUMES THAT ARTICLE 39 (L) ESTABLISHES A REQUIREMENT FOR GOVERNMENTAL ENFORCEMENT OF ANY CONCILIATION RECOMMENDATION WHICH IS ACCEPTED BY SOME BUT NOT ALL OF THE

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PARTIES TO CONCILIATION. SUCH ENFORCEMENT WOULD, IN OUR VIEW, INVOLVE OFFICIAL SANCTION OF DISCRIMINATORY PRACTICES WHICH WOULD BE CONTRARY TO PROVISIONS OF NOTE 1 FORBIDDING PREFERENTIAL TREATMENT FOR NATIONAL FLAG SHIPPING. SECOND AREA OF DISAGREEMENT INVOLVES SITUATION WHERE A PARTY REJECTS CONCILIATION RECOMMENDATIONS, IN WHICH CASE WE BELIEVE AGRIEVED PARTY COULD SEEK RECOURSE IN NATIONAL COURTS, AS IMPLIED IN ARTICLE 25 (3). WE ASSUME NATIONAL COURTS WOULD EXAMINE CASE ON BASIS OF CONTRACT LAW GOVERNING CONFERENCE ASSOCIATION AGREEMENT, BUT WOULD ULTIMATELY BE UNABLE TO MAKE FINDING CONTRARY TO CONVENTION IF NATIONAL LEGISLATION HAS BEEN PASSED TO IMPLEMENT CONVENTION. (NB: IF A COUNTRY USES ADMINISTRATIVE MEASURES TO IMPLEMENT CONVENTION, AND NATIONAL COURTS SUBMIT RULING CONTRARY TO CONVENTION, THESE ADMINISTRATIVE MEASURES WOULD EITHER HAVE TO OVERRULE LIMITED OFFICIAL USE

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COURT FINDINGS OR WOULD BE DEEMED INSUFFICIENT TO CARRY OUT IMPLEMENTATION REQUIREMENTS OF ARTICLE 47 (1)).

8. AN EXAMPLE MAY HELP TO CLARIFY ABOVE SITUATION. SUPPOSING CONFERENCE IS ALREADY ESTABLISHED AND CONTAINS THREE SHIPPING LINES OF DIFFERENT NATIONALITIES WHO HAVE PRIVATELY AGREED WITHIN CONFERENCE TO SHARE TRADE EQUALLY. SUPPOSE FURTHER THAT TWO NATIONAL LINES OF TRADING COUNTRIES DECIDE TO SEEK INCREASE OF THEIR SHARE FROM 33 TO 40 PERCENT, WITH THIRD COUNTRY SHIPPING LINE LIMITED TO 20 PERCENT. IN SUCH A CASE, THIRD COUNTRY LINE COULD DEMAND INTERNATIONAL CONCILIATION, BUT CONCILIATORS WOULD HAVE TO FIND IN FAVOR OF ARTICLE 2 CARGO-SHARING PROVI-

SIONS IN CONVENTION. GOVERNMENTS WOULD THEN HAVE TO ENFORCE THIS RECOMMENDATION FOR PARTIES WHICH ACCEPT IT (ARTICLE 39 (1)). THIRD COUNTRY LINE COULD THEN REJECT RECOMMENDATION, BUT WHAT WOULD HAPPEN NEXT? IF HE GOES TO NATIONAL COURTS WHERE LAWS OF CONTRACT APPLY, HE MIGHT OBTAIN FAVORABLE RULING ON BASIS OF ORIGINAL CONFERENCE AGREEMENT TO SHARE CARGO EQUALLY. SUCH A DETERMINATION BY DOMESTIC COURT WOULD, HOWEVER, BE CONTRARY TO INTERNATIONAL OBLIGATIONS UNDERTAKEN BY STATE AS CONTRACTING PARTY TO CONVENTION. COULD SUCH A SITUATION ARISE? IN OUR VIEW, IT COULD NOT, SINCE INTERNATIONAL OBLIGATIONS WOULD HAVE PRECEDENCE OVER DOMESTIC LAW. THUS, GOVERNMENTS WOULD ULTIMATELY HAVE TO ENFORCE CONCILIATION RECOMMENDATIONS EVEN IF THEY ARE NOT ACCEPTED BY PARTIES TO CONCILIATION.

9. MISSION NEEDS LEGAL OPINION URGENTLY ON INTERPRETATION IN PARAS 5, 7 AND 8 ABOVE. WE NEED TO KNOW, MORE GENERALLY, WHETHER (AND WHY) DEPARTMENT BELIEVES CONVENTION IS MANDATORY AND IS ENFORCEABLE. ARGUMENTS ON THIS POINT ARE CENTRAL TO INVISIBLES COMMITTEE DISCUSSION OF OBLIGATIONS UNDER UN CONVENTION, AND TO DETERMINATION OF COMPATIBILITY WITH INVISIBLES CODE.

10. OTHER CHANGES IN CHAPTER III ARE AS FOLLOWS:

A. PARA 63 WAS NOT ACCEPTED BY MINORITY AND WILL BE SUBJECT TO DIVIDED INTERPRETATION.

B. PARAS 64-66 WERE DELETED AT UK SUGGESTION.
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C. PARA 70 WAS DELETED TO HELP GERMAN EXPERT, AND PARAS 67-7L ARE BEING REDRAFTED BY SECRETARIAT TO CAST ADDITIONAL DOUBT ON FREEDOM OF COMPETITION BETWEEN CONFERENCE AND NON-CONFERENCE LINES. (THIS MAY BE UNACCEPTABLE TO MINORITY).

10. CHANGES IN CHAPTER IV: US AND UK REDRAFTED CHAPTER IV MAJORITY OPINION IN EFFORT TO RETAIN LARGE PART OF ARGUMENTATION IN FIRST DRAFT VERSION OF REF DOC, WHICH, ALTHOUGH SUPPORTED BY EIGHT OUT OF TWELVE MEMBERS OF COMMITTEE IN SEPTEMBER, WAS NEVERTHELESS DELETED BY SECRETARIAT IN SECOND DRAFT. US AND UK ARE NOW IN PROCESS OF TIGHTENING THIS MAJORITY OPINION PRIOR TO NOVEMBER 15 DRAFTING SESSION. WE WOULD APPRECIATE DEPARTMENT'S VIEWS ON MAJORITY OPINION OUTLINED BELOW, PARTICULARLY IN VIEW OF SECRETARIAT PROPOSAL (SEPTTEL) FOR A CHAPTER IV WHICH CONCLUDES THAT IC DOES NOT HAVE ADEQUATE INFORMATION TO MAKE A DETERMINATION ON COMPATIBILITY. REVISED PARAS 73-79 FOLLOW:

"73. INCOMPATIBILITY DOES NOT ENSUE FROM THE RESTRICTIVE PRACTICES STIPULATED BY THE PROPOSED UNITED NATIONS

CONVENTION AS SUCH--THESE NEED NOT NECESSARILY BE MORE
STRINGENT OR DISCRIMINATORY THAN THEY HAVE BEEN HITHERTO
--BUT FROM THE MANNER OF THEIR IMPLEMENTATION AND ENFORCE
MENT.

"74. ARTICLE 47 (1) REQUIRES GOVERNMENTS TO TAKE

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SUCH LEGISLATIVE OR OTHER MEASURES AS MAY BE NECESSARY
TO IMPLEMENT THE CONVENTION. IT IS CLEAR FROM ARTICLE
25 (3) THAT THE CONVENTION CONTEMPLATES REMEDIES UNDER
NATIONAL LAW. THE IMPLEMENTATION OF ARTICLE I ON MEMBER-
SHIP AND ARTICLE II ON CARGO SHARING OF THE UNITED NA-
TIONS CONVENTION WILL REQUIRE CONTRACTING PARTIES TO
ADOPT AND TO ENFORCE BY LEGISLATIVE OR GOVERNMENTAL AC-
TION CERTAIN RESTRICTIVE MEASURES OF THE KIND EXPRESSLY

PROHIBITED BY THE OECD CODE AND BY NOTE 1.

"75. UNDER THE PROPOSED UNITED NATIONS CONVENTION MEMBER COUNTRIES WILL THUS HAVE TO TAKE GOVERNMENTAL ACTION TO ENSURE THE IMPLEMENTATION OF RULES WHICH DISCRIMINATE AGAINST THIRD-COUNTRY SHIPPING LINES REGARDING MEMBERSHIP OF LINER CONFERENCES AND REGARDING CARGO-SHARING WITHIN LINER CONFERENCES. SUCH GOVERNMENTAL LIMITED OFFICIAL USE

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ACTION WOULD DIRECTLY OR INDIRECTLY CUT ACROSS LIBERALISATION BY CURTAILING THE 'UNRESTRICTED OPPORTUNITY' OF RESIDENTS TO OBTAIN SERVICES FROM OR RENDER SERVICES TO NON-RESIDENTS. THE RESIDENT SHIPPER WOULD BE OFFICIALLY PRECLUDED FROM CONCLUDING A TRANSACTION WITH THE NON-RESIDENT SHIPPING LINE OF HIS CHOICE TO CARRY HIS CARGO IN A GIVEN LINER CONFERENCE IF OWING TO ACTION OF HIS GOVERNMENT UNDER ARTICLE I THAT SHIPPING LINE WERE NOT ADMITTED TO THE CONFERENCE. THE RESIDENT SHIPPING LINE WOULD BE SIMILARLY PRECLUDED FROM CONCLUDING A TRANSACTION WITH A NON-RESIDENT SHIPPER OF ITS CHOICE IF THE QUOTA IMPOSED UNDER ARTICLE II OF THE CONVENTION WERE FULL WITHIN WHICH THE FORMER MAY CARRY CONFERENCE CARGO. A THIRD COUNTRY SHIPPING LINE COULD BE PRECLUDED FROM JOINING A CONFERENCE ON CONDITIONS EQUAL TO THOSE APPLICABLE TO NATIONAL LINES AND THUS FREELY TO OFFER ITS SERVICES FOR THE CARRIAGE OF CONFERENCE TRADE TO RESIDENT OR NON-RESIDENT SHIPPERS. THE CONTRACTING PARTY WOULD HAVE A DUTY TO ENFORCE SUCH RULES BY COURT OR GOVERNMENT ACTION AS APPROPRIATE.

"76. IN ANY OF THESE EVENTS THE LIBERALISATION OBLIGATIONS UNDER THE OECD CODE WOULD THUS NOT BE COMPLIED WITH BECAUSE THE TRANSACTIONS WOULD NOT BE AUTHORISED. THE RESIDENT SHIPPER OR SHIPPING LINE'S "FREEDOM OF TRANSACTIONS IN CONNECTION WITH MARITIME TRANSPORT" WOULD "BE HAMPERED BY LEGISLATIVE PROVISIONS IN FAVOR OF THE NATIONAL FLAG" (NOTE 1), WHICH WOULD "DISCRIMINATE AS BETWEEN OTHER MEMBERS IN AUTHORISING CURRENT INVISIBLE OPERATIONS" (ART. 9).

"77. THE OFFICIALLY MANDATORY CHARACTER OF THE 40:40:20 CARGO-SHARING RULE IS APPARENTLY MITIGATED BY THE PROVISIO THAT THE RULE "SHALL BE OBSERVED" ONLY "UNLESS OTHERWISE MUTUALLY AGREED", A PHRASE WHICH SEEMS TO LEAVE THE MEMBERS OF A LINER CONFERENCE FREE TO CONSENT PRIVATELY TO ANY OTHER FORMULA. THIS NECESSARILY IMPLIES THAT IF A NATIONAL SHIPPING LINE DOES NOT AGREE TO SOMETHING ELSE, IT IS ASSURED OF PARTICIPATION IN THE 40 PER CENT MINIMUM QUOTA. WHERE THE NATIONAL SHIPPING

LINES HAVE LESS THAN 40 PER CENT, THERE IS AN INCENTIVE
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TO INSIST ON THIS RIGHT. IN ANY CASE, THE EXPLICIT
DRAFTING OF ARTICLE 2 (4) AND OF THE OTHER RELEVANT PARAGRAPHS OF ARTICLE 2 HARDLY PERMITS THE INTERPRETATION THAT THE AUTHORS INTENDED THE 40:40:20 RULE TO BE NO MORE THAN A SUGGESTION. IN THIS INSTANCE THE OBJECTIVE OF ENSURING A BALANCE OF INTEREST UNDOUBTEDLY OVERRIDES THE PRINCIPLE OF NON-DISCRIMINATION, OTHERWISE THE SUBJECT OF "PARTICIPATION IN TRADE" WOULD NOT HAVE BEEN GIVEN SO MUCH MANDATORY WEIGHT.

"78. THE MAJORITY AGREE THAT UNTIL THE CONCILIATION PROCEDURE IS EXHAUSTED GOVERNMENTS OR COURTS HAVE NO RIGHT OF INTERVENTION UNDER THE CONVENTION. INDEED, THE PROVISIONS FOR A DISPUTES PROCEDURE IMPLY THAT THEY SHOULD NOT DO SO PRIOR TO ITS COMPLETION. BUT IF THE DISPUTES PROCEDURE FAILS AND THE RECOMMENDATIONS OF THE CONCILIATORS ARE NOT ACCEPTED, THE CONTRACTING STATE HAS AN OBLIGATION TO TAKE MEASURES (NORMALLY THROUGH THE COURTS) WHEREBY THE DISSATISFIED PARTY CAN SECURE THE RIGHTS GIVEN UNDER THE PROVISIONS OF ARTICLE 2 (4) WHICH ARE IN MANDATORY TERMS. MOREOVER, ARTICLE 25 (3) CONTEMPLATES REMEDIES IN THE NATIONAL COURTS.

"79. THE MAJORITY AGREES THAT THE LEGAL PROVISIONS OF THE CONVENTION DO NOT APPLY TO NON-CONFERENCE LINERS, DESPITE THE COMMENTS OF THE INDIAN SPOKESMAN FOR THE GROUP OF 77. HOWEVER, THE MAJORITY NOTES THE INTENTION

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PA-01 RSC-01 PRS-01 SP-02 SS-15 FRB-01 OMB-01 TAR-01

SWF-01 AGR-05 AID-05 COME-00 EB-04 LAB-01 OIC-02

SIL-01 STR-01 TRSE-00 CIEP-01 CEA-01 DOTE-00 FMC-01

CG-00 COA-01 DLOS-03 AF-04 ARA-06 EA-06 NEA-06 /111 W

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LIMITED OFFICIAL USE SECTION 06 OF 06 OECD PARIS 27000

OF NOTE 1 TO "GIVE RESIDENTS OF ONE MEMBER STATE THE UNRESTRICTED OPPORTUNITY TO AVAIL THEMSELVES OF ALL MARITIME TRANSPORT SERVICES WHICH ARE OFFERED BY RESIDENTS OF ANY OTHER MEMBER STATE". IN REFERRING TO ALL SERVICES, THE MAJORITY BELIEVES THAT NOTE 1 INCLUDES SERVICES OFFERED BY CONFERENCES; THUS, UNRESTRICTED OPPORTUNITY IS NOT MAINTAINED BY ASSURING ACCESS ONLY TO NON-CONFERENCE LINES. MOREOVER, ON PRACTICAL GROUNDS, SHIPPERS CHOOSING TO USE NON-CONFERENCE LINES, OR TO DIVIDE THEIR SHIPMENTS BETWEEN CONFERENCE AND NON-CONFERENCE LINES, WOULD LOSE THE PRIVILEGE OF LOYALTY STATUS IN CONFERENCES, WHICH WOULD DISCOURAGE EXTENSIVE RECOURSE TO NON-CONFERENCE TRAFFIC.

11. CHANGES IN CHAPTER V: AT MAJOR INSISTENCE, SECRETARIAT AGREED TO RE-CIRCULATE PARAS 84 AND 85 OF FIRST DRAFT, LIMITED OFFICIAL USE

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WHICH WERE CUT FROM REF DOC DESPITE REQUEST BY MAJORITY OF IC IN SEPTEMBER THAT THEY BE RETURNED FOR FURTHER DISCUSSION. PARA 84 ON QUESTION OF CONTROLLING OBLIGATION CONTAINS SENTENCE WHICH US EXPERT CONSIDERS QUESTIONABLE, AS FOLLOWS: "IF SOME BUT LESS THAN ALL OECD MEMBER COUNTRIES BECOME PARTIES TO THE CONVENTION, THEN THE CONVENTION MIGHT BE DEEMED AS ALTERING THE OBLIGATIONS OF THE CONTRACTING PARTIES AMONG THEMSELVES..." WE NEED TO KNOW IF THIS IS PROPER LEGAL INTERPRETATION, SINCE IT APPEARS UNLIKELY IN OUR VIEW THAT OBLIGATIONS UNDER OECD CODE COULD BE ALTERED BY COMMON CONSENT AMONG SOME BUT NOT ALL OECD MEMBERS.

12. MISSION WOULD APPRECIATE TELEGRAPHIC (OR AT LEAST
TELEPHONIC) RESPONSE TO QUESTIONS RAISED IN ABOVE PARAS
IN TIME FOR NOVEMBER 15 DRAFTING SESSION. (NB: AFTER
HOURS, GERVERS CAN BE REACHED AT HOME TELEPHONE 326-20-
77).
TURNER

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Message Attributes

Automatic Decaptioning: X
Capture Date: 01 JAN 1994
Channel Indicators: n/a
Current Classification: UNCLASSIFIED
Concepts: MARINE TRANSPORTATION, SHIPS, STANDARDS, INVISIBLES (BALANCE OF PAYMENTS), MEETING PROCEEDINGS
Control Number: n/a
Copy: SINGLE
Draft Date: 13 NOV 1974
Decaption Date: 01 JAN 1960
Decaption Note:
Disposition Action: RELEASED
Disposition Approved on Date:
Disposition Authority: cunninfx
Disposition Case Number: n/a
Disposition Comment: 25 YEAR REVIEW
Disposition Date: 28 MAY 2004
Disposition Event:
Disposition History: n/a
Disposition Reason:
Disposition Remarks:
Document Number: 1974OECDP27000
Document Source: CORE
Document Unique ID: 00
Drafter: n/a
Enclosure: n/a
Executive Order: N/A
Errors: N/A
Film Number: D740327-0952
From: OECD PARIS
Handling Restrictions: n/a
Image Path:
ISecure: 1
Legacy Key: link1974/newtext/t19741147/aaaabnvp.tel
Line Count: 716
Locator: TEXT ON-LINE, ON MICROFILM
Office: ACTION EUR
Original Classification: LIMITED OFFICIAL USE
Original Handling Restrictions: n/a
Original Previous Classification: n/a
Original Previous Handling Restrictions: n/a
Page Count: 14
Previous Channel Indicators:
Previous Classification: LIMITED OFFICIAL USE
Previous Handling Restrictions: n/a
Reference: OECD DOC. DAF/INF/74.46 (1ST REVISIO, N)
Review Action: RELEASED, APPROVED
Review Authority: cunninfx
Review Comment: n/a
Review Content Flags:
Review Date: 01 MAY 2002
Review Event:
Review Exemptions: n/a
Review History: RELEASED <01 MAY 2002 by cunninfx>; APPROVED <17 MAR 2003 by cunninfx>
Review Markings:

Declassified/Released
US Department of State
EO Systematic Review
30 JUN 2005

Review Media Identifier:
Review Referrals: n/a
Review Release Date: n/a
Review Release Event: n/a
Review Transfer Date:
Review Withdrawn Fields: n/a
Secure: OPEN
Status: NATIVE
Subject: INVISIBLE COMMITTEE DISCUSSION OF UN LINER CODE, NOVEMBER 6-8
TAGS: EFIN, OECD, UN
To: STATE GENEVA
Type: TE
Markings: Declassified/Released US Department of State EO Systematic Review 30 JUN 2005